Supreme Court, U.S.
FILED

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No. _____

in the

Supreme Court

of the

United States

October Term 1998

KELVIN SAMUELS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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25P

QUESTION PRESENTED

I.

Whether the district court erred in dismissing the Petitioner's § 2255 motion as being outside the time limits of the AEDPA?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED. .	3
STATEMENT OF THE CASE.	3
REASON FOR GRANTING THE WRIT. . . .	
1. The court erred in determining that the Petitioner had not filed his § 2255 motion within a reasonable time of the enactment of the AEDPA	6
CONCLUSION	10
APPENDIX	X
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Lindh v. Murphy, __ U.S. __, 117 S.Ct. 2059 (1997) 9

United States v. Flores, 135 F.3d 1000 (5th C. 1998) 8

United States v. Lopez, 115 S.Ct. 1624 (1995) 5

United States v. Simmonds, 111 F.3d 737 (10th C. 1997) 8

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The Petitioner, Kelvin Samuels, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of

Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 29, 1999.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported (case no. 98-10014 and 98-10874) That determination is attached hereto in Appendix 4. The district court's order denying the Petitioner's § 2255 as untimely was not published, but is attached to this petition in Appendix 2. The district court's order adopted the magistrate's findings, attached to the petition as Attachment 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The

jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On October 30, 1992, the Petitioner

was convicted by a jury of assault, in violation of 18 USC § 111, the use and carrying of a firearm, in violation of 18 USC § 924, and robbery affecting interstate commerce, in violation of 18 USC § 1951(a). The Petitioner was sentenced to a total of 567 months incarceration.

The Petitioner appealed his conviction and sentence to the Fifth Circuit, raising the following issues:

1. Prosecutorial misconduct
2. A challenge to the racial composition of the jury
3. Erroneous jury instructions
4. Sufficiency of the evidence

The Petitioner's conviction was affirmed.

The Petitioner subsequently filed pro-se, on May 8, 1997, a motion styled as a 12(b) motion. On August 26, 1997, counsel filed a notice of appearance and request to dismiss the 12(b) motion or to amend to include issues pursuant to 28 USC § 2255. On November 3, 1997, an amended § 2255 was

filed by counsel, raising the following issues:

1. Whether the Petitioner's offense affected interstate commerce, in light of *United States v. Lopez*, 115 S.Ct. 1624 (1995)
2. Whether the Petitioner's § 924 charge was proper
3. Whether counsel rendered ineffective assistance by failing to object to a § 3C1.1 enhancement

The Magistrate filed a report and recommendation on November 5, 1997. The Magistrate determined that under the AEDPA, the Petitioner had until April 24, 1997, to file his § 2255 motion and therefore, both petitions were untimely. (Attachment 1) The Magistrate also found that the petition filed by counsel was a successive petition. The district court adopted the Magistrate's finding in toto on December 1, 1997.

The Petitioner requested a certificate of appealability to the Fifth Circuit on

the issues of the court treating the amended petition and a successive petition, and for applying the one year time limit to the Petitioner. The Fifth Circuit denied a certificate on both claims on January 29, 1999.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that his Fifth Amendment right to Due Process of law has been violated. The Petitioner was never put on notice by the AEDPA itself or the Fifth Circuit that he had one year in which to file a § 2255 motion. The court should therefore have not dismissed the petition

1. The court erred in dismissing the Petitioner's § 2255 motion as untimely

The district court denied the Petitioner's § 2255 procedurally, on the grounds that he did not file the motion within one year of the enactment of the AEDPA.

The AEDPA was enacted on April 23, 1996. The 1996 amendments provide in part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> > (1) the date on which the judgment of conviction becomes final;
> > (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> > (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactive to cases on collateral review; or
> > (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Prior the 1996 amendments, defendants could bring motions under 28 USC § 2255 without consideration of a time limitation.

Several courts have held that the enactment of the AEDPA applies in part to those defendants whose sentences have become final before its enactment. In

particular, the Fifth Circuit Court of Appeals has determined, in the case of *United States v. Flores*. 135 F.3d 1000 (5th C. 1998), that defendants whose convictions had already become final should be afforded a "reasonable time" to file their § 2255 motions after the enactment of the AEDPA. *Id.* at 1005 The court determined that 1 year from the enactment would be a reasonable time to file such petitions. This same rationale has been adopted by the other circuits which have ruled on this issue. See, for example, *United States v. Simmonds*, 111 F.3d 737 (10th C. 1997)

The problem with this one year time limitation is that persons such as the Petitioner were never put on notice of this one year time limitation. The express language of the AEDPA was silent as to how the time limitations affected those persons already incarcerated. According to the exact language of the statute, either the Petitioner was already out of time at the

enactment of the AEDPA (if it applied to him), or he had any amount of time to file his petition, if it didn't apply to him. As this Court noted in *Lindh v. Murphy*, __ U.S. __, 117 S.Ct. 2059 (1997), "in a world of sild purses and pigs' ears, the Act is not a silk purse of the art of statutory construction." *Id.* at 2068.

The fact that the Fifth Circuit eventually ruled that defendants had one year did not provide adequate notice. The *Flores* case was decided on March 5, 1998, almost a year after the alleged due date. Thus, the Petitioner could not have been on notice by the Fifth Circuit's decisions.

The one year time limitation for defendants whose convictions were final at the time of the enactment of the AEDPA is a judicial construction. As such, defendants must be given some reasonable notice so that they can act. The Petitioner submits that he was never given adequate notice; therefore, his pleadings were filed within

a reasonable time of the AEDPA. For this reason, the court of appeals decision denying a certificate of appealability should be reversed.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for a determination of his § 2255 on its merits.

Respectfully submitted,

Kevin M. Schad
Attorney for Petitioner
Schad, Buda, Cook, L.L.C
6310 E. Kemper Rd.
Suite 125
Cincinnati OH 45241

APPENDIX

1. MAGISTRATE'S DECISION NOVEMBER 5, 1997.

2. DISTRICT COURT ORDER DECEMBER 1, 1997.

3. DISTRICT COURT DENIAL OF CERTIFICATE OF APPEALABILITY MARCH 16, 1998

4. COURT OF APPEALS DENIAL OF CERTIFICATE OF APPEALABILITY DATED JANUARY 29, 1999

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing was sent this 26th day of April, 1999, by regular U.S. mail with sufficient postage affixed to the office of:

Office of the Solicitor General
Department of Justice
Room 5143
10th St. and Constitution Ave NW
Washington DC 20530

Submitted,

Kevin M. Schad
Attorney for Petitioner
Schad, Buda, Cook, L.L.C
6310 E. Kemper Rd.
Suite 125
Cincinnati OH 45241

APPENDIX 1
MAGISTRATE'S DECISION NOVEMBER 5, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
NOV -5 1997
NANCY DOHERTY, CLERK

UNITED STATES OF AMERICA
3:92-CR-0319-P(01)

v.

(Civil No.3:97-CC-1277-P)

KEVIN L. SAMUELS

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

This is a motion to vacate, set aside or correct the sentence filed pursuant to 28 U.S.C. § 2255 by an inmate confined in the Federal Correctional Institution at Leavenworth, Kansas.[1] On October 30, 1992,

---

[1]Although Petitioner filed his pleading as a motion to dismiss for lack of

after trial by jury, Samuels was found guilty on six counts of the indictment filed in this action and thereafter sentenced to a total of 533 months confinement. The conviction was affirmed by the Fifth Circuit Court of Appeals on January 20, 1994. On April 28, 1994, Samuels filed a § 2255 motion to vacate, set aside or correct his sentence which, pursuant to his motion for dismissal, was dismissed without prejudice on November 29, 1994.

On April 24, 1996, Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective. Pub.L. 104-132, 110 Stat. 1217. The AEDPA made substantial changes in the way that § 2255 motions are handled by federal courts. Motions filed under 28 U.S.C. § 2255 are

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jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), he attacks the validity of his federal criminal conviction. Specifically, Petitioner claims that the trial court lacked jurisdiction to convict and sentence him. Thus, his pleading is properly construed as a motion filed in his criminal case under 28 U.S.C. § 2255.

now subject to a one-year statute of limitation. 28 U.S.C. § 2255. Because his conviction was affirmed by the Court of Appeals on January 20, 1994, prior to enactment of the AEDPA, Samuels' one-year limitation period ran from April 24, 1996, the effective date of the AEDPA. The instant motion was filed on May 8, 1997. The certificate of service submitted by Samuels as an attachment to his motion certifies that he placed his motion in the prison mail for filing on May 5, 1997. Thus, it is clear that the motion is untimely.

RECOMMENDATION:

I recommend that the motion be dismissed as untimely.

SIGNED this 5th day of November, 1997.

"S/_____".
UNITED STATES MAGISTRATE JUDGE

NOTICE

A party's failure to file written objections to the proposed findings, conclusions and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of

plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object.

APPENDIX 2
DISTRICT COURT ORDER DECEMBER 1, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
DEC 1 1997
NANCY DOHERTY, CLERK

UNITED STATES OF AMERICA

VS.

NO. 3:92-CR-0319-P
(3:97-CV-1277-P)

KEVIN L. SAMUELS

ENTERED ON DOCKET
DEC 02 1997
PURSUANT TO F.R.C.P.
RULES 58 AND 79a

FINDINGS OF THE COURT

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

Signed this 1st day of December, 1997.

"S/_____".
UNITED STATES DISTRICT JUDGE

APPENDIX 3
DISTRICT COURT DENIAL OF CERTIFICATE OF APPEALABILITY MARCH 16, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
MAR 16 1998
NANCY DOHERTY,
CLERK

UNITED STATES OF AMERICA

No. 3:97-CV-1227-P

v.

No. 3:92-CR-319-P

KEVIN L. SAMUELS

CERTIFICATE OF APPEALABILITY

A Notice of Appeal has been filed in this case. Pursuant to Federal Rule of Appellate Procedure 22(b), I find and recommend as follows:

( )a Certificate of Appealability should be GRANTED.
(**X**)a Certificate of Appealability should be **DENIED**.

(**X**) the party appealing is a pauper.
( ) the party appealing is not a pauper.

REASONS FOR DENIAL: For the reason stated in the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed January 7, 1998, and the Finding of the Court and Judgment, filed on January 30, 1998, the Petitioner has failed to make a substantial showing of the denial of a federal constitutional right. See Drinkard v. Johnson, 97 F.3d 751, 755-56 (5th Cir. 1996).

DATE: March 13, 1998 "S/_____".
UNITED STATES MAGISTRATE JUDGE

ORDER OF THE COURT
ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b), the Court hereby finds and orders:

( )a Certificate of Appealability is GRANTED.
(X)a Certificate of Appealability is DENIED.

(X)the party appealing is a pauper.
( )the party appealing is not a pauper.

DATE: 3-16-98 "S/_____".
UNITED STATES DISTRICT JUDGE

APPENDIX 4
COURT OF APPEALS DENIAL OF CERTIFICATE OF APPEALABILITY DATED JANUARY 29, 1999

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 98-10014 & 10874

U.S. COURT OF APPEALS

FILED
JAN 29 1999
CHARLES R. FULBRUGE
CLERK

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KEVIN SAMUELS,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ORDER:

Kevin Samuels, federal prisoner # 23418-077, has filed a request for a certificate of appealability ("COA") to appeal the district court's December 1, 1997, dismissal of his 28 U.S.C. § 2255 motion filed on May 8, 1997, and the district court's January 30, 1998, dismissal of his § 2255 motion filed on

November 3, 1997. Samuels argues that the district court erred in applying the AEDPA's one-year statute of limitations to his first § 2255 motion. Samuels also argues that the district court erred in dismissing his second § 2255 motion as successive. He argues that the second § 2255 motion should have been treated as an amendment to his first § 2255 motion.

Because both of Samuels' § 2255 motions were filed after the April 24, 1996, effective date of the AEDPA, the AEDPA is applicable to Samuels' motions. *See Lindh v. Murphy,* 117 S. Ct. 2059, 2068 (1997); *United States v. Carter,* 117 F.ed 262, 264 (5th Cir. 1997). Samuels must obtain a COA to proceed on appeal. *See* 28 U.S.C. § 2253(c)(1). To obtain a COA, he must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). In considering a nonconstitutional question in a COA, such as the time-bar issue presented here, the standard is whether the petitioner has made

a credible showing of error by the district court. *See Sonnier v. Johnson*, 161 F.3d 941, 943-44 (5th Cir. 1998). Even if the district court erred in not treating Samuels' second § 2255 motion as an amendment to his first § 2255 motion, Samuels has not made a credible showing that the district court erred in dismissing his first § 2255motion as time-barred. *See United States v. Flores*, 135 F.3d 1000, 1002-06 (5th Cir. 1998), *cert. denied*, 1999, WL 8738 (1999); *see also Sonnier*, 161 F.3d at 943-44. Accordingly, Samuels' request for a COA is DENIED.

/s/ Emilio M. Garza
EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE